No. 16304

In the United States Court of Appeals for the Ninth Circuit

ESTATE OF J. LESLIE VOGEL, ROBERT G. PARTRIDGE and ELIZABETH S. VOGEL, Executors, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

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BRIEF FOR THE RESPONDENT

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OPINION BELOW

The findings of fact and the opinion of the Tax Court (R. 25-44) are reported at 30 T.C. 125.

JURISDICTION

This petition for review (R. 50-51) involves federal estate taxes upon the estate of J. Leslie Vogel, a resident of California who died on August 16, 1950 (R. 26.) On February 14, 1955, the Commissioner of Internal Revenue mailed to the taxpayers, executors, notice of a deficiency in the total amount of $29,601.88. (R. 9-16.) Within 90 days thereafter and on April 26, 1955, the taxpayers filed a petition with

the Tax Court for a redetermination of that deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 3, 5-16.) The decision of the Tax Court was entered on August 8, 1958. (R. 49.) The case is brought to this Court by a petition for review filed on September 15, 1958. (R. 4, 50-51.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court properly found that the evidence failed to establish a transmutation of community property to separate property and that the Commissioner correctly determined that the entire property of decedent and his spouse was community property.

2. Whether the taxpayers failed to demonstrate that an amount in excess of $1,000 per month for 18 months was a reasonable family allowance for the sole support of the widow in ascertaining the deduction for family allowance from the gross estate.

3. Whether the deduction for attorney fees could be raised as a new issue under the Tax Court Rule 50 computation.

4. Whether the deduction in full of funeral expenses was timely raised in the Tax Court Rule 50 computation, and, assuming it was timely, whether the deduction was properly limited to one-half the amount of the funeral expenses.

STATEMENT

The facts as found by the Tax Court (R. 25-36), some of which were stipulated (R. 18-25), are as follows:

The decedent, J. Leslie Vogel, died August 16, 1950, a resident of California. A federal estate tax return was filed on February 15, 1952, by the executors of his estate with the Collector of Internal Revenue for the First District of California. (R. 26)

On January 15, 1934, the Les Vogel Chevrolet Company was incorporated to operate an automobile agency. The stock of the corporation was community property of J. Leslie Vogel (hereinafter referred to as decedent or Les Vogel), and his wife, Elizabeth S. Vogel (hereinafter sometimes referred to as Elizabeth Vogel or Elizabeth). (R. 27)

In 1942, the decedent, in order to avoid the application of the excess profits tax, to admit his son, Les Vogel, Jr., into the business and for other reasons, decided to dissolve the corporation and to form a limited partnership. The corporate minutes indicate that the assets of the corporation were transferred to the decedent as of midnight, December 31, 1942. A resolution was written in 1942 looking to the dissolution of the corporation. The partnership agreement was executed on February 6, 1943, and named Elizabeth Vogel and Les Vogel, Jr., as limited partners, with decedent as a general partner for a term of 10 years from January 1, 1943, each having an equal share in the profits. The opening entries in the partnership ledger show the following capital accounts: (R. 27)

Les Vogel	$33,147.71
Les Vogel, Jr.	33,147.70
Mrs. Les Vogel	33,147.70

Separate drawing accounts were maintained for each partner. Income tax payments were charged to the respective drawing accounts. Other than income tax, the only charge to Elizabeth's drawing account was a monthly allowance of $100 and a monthly payment of $500 on an F. H. A. loan on the family residence. Taxes on the residence were charged to decedent's drawing account. (R. 27)

On November 1, 1946, the business was again incorporated. (R. 27.) The partnership balance sheet, as of October 31, 1946, filed with the application for incorporation, showed the following (R. 28):

Accounts payable:	
Les Vogel	$66,083.09
Elizabeth Vogel (Mrs. Vogel)	73,880.64
Les Vogel, Jr.	37,664.26
	$177,627.99
Partners' capital:	
Les Vogel	$32,709.22
Elizabeth Vogel	32,709.20
Les Vogel, Jr.	32,709.20
	$98,127.62

The opening balance sheet for the corporation showed the following (R. 28):

Capital stock	$150,000.00
Accounts payable:	
Les Vogel and Elizabeth Vogel	$105,382.15
Les Vogel, Jr.	20.373.46
	$125,755.61

In order to provide a $50,000 payment by each partner for the stock issued, the amounts necessary to bring each of the partnership capital accounts up to $50,000 were taken from the accounts payable. One-third of the stock in the new corporation was issued to each of the former partners. The decedent and Elizabeth held theirs individually in their own names. The value of the capital stock was subsequently increased to $300,000 with 30,000 shares outstanding. At the time of the decedent's death, decedent, Elizabeth, and Les Vogel, Jr., each held 10,000 shares. (R. 28-29.)

The decedent and Elizabeth maintained two savings accounts in both their names, a savings account in the name of Elizabeth Vogel, and a checking account in the name of Les or Elizabeth Vogel. (R. 29.)

Following the dissolution of the partnership the separate drawing accounts of the decedent and Elizabeth were combined into one account on the books of the corporation. Various investments and personal expenses of the decedent, along with other items, were charged against this account. With the exception of income tax, the only charge to the account specifically applicable to Elizabeth was a $3,000 gift to their son. A similar $3,000 gift to the son from the decedent was charged against the account on the same day. On October 31, 1947, the remaining balance was divided into two equal parts of $11,662.05. One part was deposited in the savings account at the Marina Branch of the Bank of America in the name of Elizabeth Vogel. Some of the decedents's salary checks were also deposited there. Later,

these amounts were transferred to the checking account. (R. 29.)

The other portion of the drawing account was deposited in the savings account in the name of Les or Elizabeth Vogel at the Polk-Van Ness Branch of the Bank of America. It was subsequently withdrawn. (R. 29-30.)

The principal deposits to the savings account in the name of J. Les and Elizabeth Vogel at Branch 253 of the Bank of America were salary checks of the decedent. Elizabeth made most of these deposits; it was her practice to retain $100 to $300 from the checks for household expenses and to deposit the balance. Transfers were made from this account to the checking account. (R. 30.)

Not all salary checks were deposited in the savings accounts; a number were deposited in the checking account. The decedent made payments from the checking account for his own individual expenditures, for joint living expenses, and for investments in Elizabeth's name. (R. 30.)

The decedent and Elizabeth maintained separate brokerage accounts, decedent's account being opened in 1946 and Elizabeth's in 1948. Purchases by the decedent during 1946 and 1947 were charged to his partnership drawing account prior to the partnership dissolution on October 31, 1946, and to their drawing account on the corporation's books subsequent to that date. Investments in Elizabeth's brokerage account were paid for from the checking account. (R. 30.)

Payment for 467 shares of Bank of America stock standing in Elizabeth Vogel's name was also made from the checking account. (R. 30.)

In 1948 or 1949 the Leslie Financing Company was formed by Elizabeth Vogel, Les Vogel, Jr., and Dorothea Vogel. Each contributed $10,000 to the initial capital. Elizabeth obtained the necessary funds from previous investments. (R. 30-31.)

About 1950 Elizabeth purchased a parcel of real property from Arthur M. Hardy, an old friend of the family. Hardy then designed and built the Anzavista Apartments on the property. All of Hardy's negotiations in the matter were with Elizabeth and the apartments were built for her. The record is inconclusive as to the source of the funds for the apartment venture. (R. 31.)

During a conversation with an internal revenue agent after decedent's death, Elizabeth referred to the Anzavista property as decedent's. She further represented that whatever property she and decedent had belonged to both of them. At the trial Elizabeth referred to the Anzavista property as "the whole family's". (R. 31.)

The tax returns of the decedent and Elizabeth Vogel for 1940 and all subsequent years were prepared by Lawrence H. Goebel, a certified public accountant. The information for these returns was mostly obtained from the office manager of the Les Vogel Chevrolet Company. Goebel reviewed the returns with the decedent, but could not recall discussing the nature of the property with him. Goebel assumed that the income from the various sources was community property, to be split accordingly. (R. 31.)

Separate federal returns were filed for the years 1946 and 1947, and joint returns for the years 1948,

1949, and 1950. Separate state returns were filed for the entire period 1946 through 1950. Historically, dividends were divided between the decedent and Elizabeth Vogel. This was also true of dividends from stock registered in the decedent's or Elizabeth Vogel's name, or both names jointly. It was true of capital gain or loss on the sale of such securities. The dividends from the Les Vogel Chevrolet Company were always divided equally between the decedent and Elizabeth Vogel. (R. 31-32.)

On the 1947 federal return the capital gains on the sale of securities were described as community. On the 1947 state returns the total income reported was described as community. (R. 32.)

Upon the advice of attorneys, decedent's and Elizabeth Vogel's dividends were segregated for the first time on the 1950 state tax returns filed after the decedent's death. (R. 32.)

Robert G. Partridge was the decedent's personal attorney for approximately 15 years, beginning in the mid-1930's. Partridge and his associate, Wallace O'Connell, prepared two wills for the decedent. The first will was executed December 13, 1946. The second was never signed. (R. 32.)

The first will contained the following provisions (R. 32-33):

> Fourth: All property in which at this time I have an interest or which stands in the name of myself or myself and my wife, either as tenants in common or as joint tenants, is community property. It is my intention to dispose not only of all property which I am entitled to dis-

> pose of by will, including my separate estate and my share of the community property, but of the entire community estate. If my wife, prior to the probate of this will, shall not have elected whether she shall take under this will or the rights given her by law, she shall in due course following my death, make such election. She shall, in any event, however, be entitled to exempt property and family allowance out of my estate.

Notes taken by Partridge during a discussion with the decedent prior to the drafting of the first will included the words "transmutation agreement (Jan. 1, '43)". Partridge had had no independent knowledge on this subject and wrote down only what information the decedent communicated to him. At no time during their discussions concerning the will did the decedent show Partridge any written agreement which would have transmuted community to separate property. (R. 33.)

The decedent and Partridge never discussed the transmutation of any property other than the Les Vogel Chevrolet Company. (R. 33.)

The second, and unsigned, will was drafted for the decedent in 1950. A draft of a proposed will for Elizabeth Vogel was prepared at approximately the same time. Both drafts refer to a written agreement converting their community property to separate property. (R. 33.)

During discussions concerning the second will Partridge suggested to the decedent that it would be best to have some expression of the transmutation agreement in writing. No agreement transmuting the

property was ever prepared by Partridge or O'Connell and none was introduced in evidence, nor did any witness testify to the actual existence of such an agreement, either oral or written. (R. 33.)

Partridge did not know in fact whether there ever was a transmutation. (R. 34.)

At the time of the decedent's death, decedent, Elizabeth Vogel, their son, Les Vogel, Jr., and their daughter Dorothea lived in a three story detached dwelling at 369 Marina Boulevard, San Francisco. Both Les, Jr., and Dorothea were over 21. The residence, located in a wealthy neighborhood, had been acquired in 1941 and was held in the name of Les Vogel and Elizabeth Vogel as joint tenants. (R. 34.)

They employed a full-time maid and a gardner; the maid "lived in". Elizabeth also, on occasion, employed caterers; she entertained approximately once a month. (R. 34.)

During his lifetime most of the decedent's salary, which was about $1,800 a month, was expended in maintaining the home. (R. 34.)

After the decedent's death, Les Vogel, Jr., and Dorothea continued to occupy the house with their mother and a servant. Neither Les Vogel, Jr., nor Dorothea made any contribution to the maintenance of the home, either before or after the decedent's death. (R. 34.)

On September 7, 1950, Elizabeth Vogel filed a petition with the Superior Court of the State of California, San Francisco County, for a family allowance of $1,500 a month from the estate of J. Leslie Vogel. On September 19, 1950, the judge of the Superior

Court entered an order granting the allowance. During the probate of the estate, checks totaling $27,000 were paid to Mrs. Vogel as a family allowance. (R. 34.)

The decedent's will was admitted to probate and Elizabeth Vogel filed an election to take under its provisions on September 12, 1952. (R. 34-35.)

A federal estate tax return was filed on February 15, 1952. Various securities and miscellaneous assets were treated on the return as the decedent's separate property. No reference was made to certain property standing in the name of Elizabeth Vogel alone. Deductions were claimed on the return for a bequest to surviving spouse (marital deduction) of $61,077.55 and an allowance for support of dependents (family allowance) paid to Elizabeth Vogel totaling $27,000 ($1,500 per month for 18 months). (R. 35.)

The Commissioner determined that the entire gross estate of the decedent and Elizabeth Vogel was community property and recomputed the tax on a community property basis. The following assets standing in the name of Elizabeth Vogel were added to the gross estate (R. 35):

4 shares Pacific Turf Club stock	$1,700.00
500 shares Pacific Gas & Electric redeemable first preferred stock	7,156.25
467 shares Bank of America stock	6,333.69
217 shares Pacific Gas & Electric common stock	3,499.13
250 shares Leslie Financing Company	5,627.62
Anzavista Apartments property	8,800.00
Savings account, Marina Branch of Bank of America	1,181.74

The Commissioner decreased all expenses of administration, funeral expenses, and debts of the decedent by one-half, except $5,400 for maintenance and upkeep of a boat, which amount was totally disallowed. (R. 35.) This disallowance of $5,400 is not contested by the taxpayers. (R. 35-36, Br. 4.) The marital deduction was also disallowed. The family allowance was decreased from $1,500 per month for 18 months to $1,000 per month for the same period; one-half the total sum was permitted as a deduction. The Commissioner determined a deficiency of $29,601.88 in the return. The Tax Court sustained the Commissioner and directed that decision be entered under Rule 50. (R. 36-44.)

The taxpayers objected to the Commissioner's computation under Rule 50 (R. 44-46), claiming that certain attorneys' fees paid to their counsel had not been deducted from the gross estate, and further, that the funeral expenses should have been deducted in full rather than deducted only to the extent of one-half (R. 47-48). The Tax Court held that the attorneys' fees were not made the subject of assignment of error and were not in the case. The Tax Court also held that the funeral expenses were properly deducted to the extent of one-half only under the community property law of California. (R. 226.) The Tax Court entered a decision approving the Commissioner's computations. (R. 49.) The taxpayers appealed from that decision. (R. 50-51.)

SUMMARY OF ARGUMENT

It is a conceded fact that all the property originally owned by the decedent and his wife, Elizabeth, was community property. All the property flowing therefrom retained the community characteristic unless there had been a transmutation. The Tax Court found that the evidence failed to establish a transmutation took place. The Tax Court also found that the Commissioner correctly determined that the entire property of the decedent and his wife was community property. These Tax Court findings are fully supported by the record and by the statutory presumptions.

The Tax Court's finding that a family allowance of $1,000 per month for the sole support of the widow is reasonable, is sustained by the record and by the clear reasoning of the Tax Court. Further, the taxpayers have failed to establish that a greater amount was reasonable for purposes of computing the deduction from the gross estate.

Neither the claim for the deduction for attorney fees nor the claim for the deduction in full of the funeral expenses were timely raised when asserted by the taxpayers in the Tax Court Rule 50 computation. Even if the latter issue had been timely raised, when the entire estate consists of community property, funeral expenses are deductible only to the extent of one-half.

ARGUMENT

I

The Tax Court Correctly Found That the Evidence Failed to Establish That A Transmutation Took Place and Therefore That the Commissioner Correctly Determined That the Entire Property of Decedent and His Spouse Was Community Property

The principal question upon this review is whether the Tax Court properly held that all the assets standing in the name of the decedent and all those standing in the name of Elizabeth Vogel, his wife, were community property. The Tax Court's finding that the Commissioner's determination to that effect was correct is wholly supported by the record.

We begin with the conceded fact (R. 41, Br. 16) that originally all the property owned by decedent and Elizabeth was community property. Because of this fact, the first specification of error asserted by the taxpayers (Br. 5) is that the Tax Court erred in holding that the evidence failed to establish that a transmutation took place and that the Commissioner correctly determined that the entire property of decedent and his spouse was community property. It is fundamental that other property flowing from community property by purchase or exchange retains the character of the traceable community source. *In re Jolly's Estate*, 196 Cal. 547, 238 Pac. 353. Unless there was a transmutation from community property to separate property, the findings of the Tax Court should be sustained in their entirety. The record fails to support a finding that there was a transmutation and, in fact, the record clearly establishes the

community character of the properties whether held in decedent's name, in Elizabeth's name, or in the name of both.

Basically, under Section 164 of the California Civil Code (Appendix, *infra*), property acquired by either the husband, or the wife, or both, after marriage is presumed to be community property, and the one asserting that such property is separate has the burden of establishing that fact. *Wilson* v. *Wilson*, 76 Cal. App. 2d 119, 172 P. 2d 568. There is also a disputable presumption in Section 164 that if property is acquired by a married woman by an instrument in writing it is her separate property rather than community property. *Nichols* v. *Mitchell*, 32 Cal. 2d 598, 197 P. 2d 550. But the taxpayers are not aided by this disputable presumption because in any case concerning the question of federal estate tax upon community property the presumption that the determination of the Commissioner is correct would prevail. *Shea* v. *Commissioner*, 81 F. 2d 937 (C. A. 9th). In that analogous case, concerning another presumption contained in Section 164, this Court noted (*Shea* v. *Commissioner*, *supra*, p. 940):

> It seems fairly clear that the action of the Commissioner shifted the burden of proof to the taxpayer to show that his action was in error. See *Gordon* v. *Commissioner* (C.C.A.) 75 F. 2d 429; *Pedder* v. *Commissioner* (C.C.A.) 60 F. 2d 866.

Secondly, as clearly recognized by this Court in *Acme Distributing Co.* v. *Collins*, 247 F. 2d 607 (by quotation with approval of *Nevins* v. *Nevins*, 129 Cal. App.

2d 150, 276 P. 2d 655), whether or not a presumption is controverted is a question of fact for the trial court and its conclusion, unless manifestly without sufficient support in the evidence, is conclusive on appeal. The conclusion of the trial court herein, adverse to the taxpayers, is wholly supported by the entire record and that record manifestly demands no other conclusion.

The taxpayers apparently continue to contend, as they did below, that a transmutation of the community property to separate property took place by oral agreement between the decedent and Elizabeth. Where one spouse is dead, contentions that there had been an oral agreement of transmutation must be subjected to the most careful scrutiny. *In re Henderson's Estate*, 128 Cal. App. 397, 17 P. 2d 786. If a transmutation agreement had been arrived at its existence would necessarily have been within the knowledge of Elizabeth. As the Tax Court pointedly observed, Elizabeth, although testifying at length for the taxpayers, at no time was asked whether a transmutation agreement had ever been discussed by her and her husband or if such an agreement existed. Accordingly, the natural inference is that if such evidence had been produced it would be unfavorable. *Wichita Term. El. Co.* v. *Commissioner*, 6 T. C. 1158, affirmed, 162 F. 2d 513 (C. A. 10th).

Although taxpayers assiduously avoid pin-pointing the exact date in the brief on appeal, it was clear below that their position was that the transmutation took place on January 1, 1943, the date from which the partnership terms ran as provided in the partner-

ship agreement executed on February 6, 1943.[1] (R. 19, 27, 36). Certainly the fact that in December, 1942, decedent, to avoid the application of the excess profits tax and to admit his son, Les Vogel, Jr., into the business, dissolved the corporation and formed a limited partnership did not result in the transmutation of the corporation. Merely because Elizabeth became a limited partner in the Chevrolet business on February 6, 1943, does not mean that her interest became separate property, inasmuch as naked legal title is of little value in resolving the matter of whether property is community or separate. *Tomaier* v. *Tomaier*, 23 Cal. 2d 754, 146 P. 2d 905. Nor does a partnership agreement between a husband and wife alone transmute community property into separate property. *Van Vorst* v. *Commissioner*, 7 T. C. 826. Since a partnership agreement alone is not a vehicle of transmutation, a specific agreement to change the nature of property must be expressly found in the partnership agreement, in order to transmute property. *McCall* v. *McCall*, 2 Cal. App. 2d 92, 37 P. 2d 496. No evidence of such an agreement is in the record. (Cf. R. 39.) Without such, the investment of community assets in the partnership remains community property, and the later

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[1] The exact date assumes considerable relevance because of Section 812(e)(2)(C)(i) of the Internal Revenue Code of 1939 (Appendix, *infra*) which provides that a transmutation of community property during the calendar year 1942 or after the date of the enactment of the Revenue Act of 1948 (April 2, 1948) is still considered as community property for purposes of computation of a marital deduction.

transfer of the investment from the partnership to the corporation does not change its status. *In re Kane's Estate*, 80 Cal. App. 2d 256, 181 P. 2d 751.

Furthermore, the true nature of the Chevrolet partnership is evidence from the treatment upon dissolution and reincorporation of the business on November 1, 1946. The opening balance sheet for the corporation showed accounts payable in the name of the decedent and Elizabeth in the sum of $105,382.15. The sum necessary to bring each of the partnership accounts up to $50,000 was taken from the accounts payable and one third of the stock was issued to each of the former partners. In addition, the separate drawing accounts of the decedent and Elizabeth were combined into one account on the books of the corporation. Various investments and personal expenses of the decedent, along with other items, were charged against this account. (R. 20-22, 27-29.)

The taxpayers also claim support for their position from the treatment of the property by the decedent and from the statements of Robert G. Partridge, his personal attorney. The treatment by the decedent of the property is clearly evidenced by his will executed on December 13, 1946, and admitted to probate following his death, which clearly recited that "All property in which at this time I have an interest or which stands in the name of myself or myself and my wife, either as tenants in common or as joint tenants, is community property". (R. 32.) Prior to the drafting of the first will by him, Partridge had taken notes during a discussion with the decedent, and those notes included the words "Trans-

mutation Agreement (January 1, '43)". (R. 117-118.) Partridge testified he had no independent knowledge on this subject and could only conclude at this late date that he wrote down information communicated to him by the decedent. (R. 120-121.) Partridge also testified that at no time during their discussions concerning the first will did the decedent show Partridge any written agreement which would have transmuted community to separate property. The decedent was unable to explain to Partridge why Elizabeth's interest in the Chevrolet Company was her separate property. (R. 40, 138-141.) In short, Partridge stated that he did not know in fact if there ever was a transmutation. (R. 40, 141, 142, 201.)

A second will had been drafted for the decedent in 1950 but it was never signed. A draft of a will for Elizabeth had been prepared at approximately the same time. As the Tax Court noted, both referred to "a written agreement transmuting community property to separate property, but no direct evidence of such a written agreement was introduced at the trial." (R. 39, 117-118, 120-121.)[2]

At the time of drafting the second will Partridge had suggested to the decedent that it would be best to have some expression of a transmutation agreement in writing. But, as the Tax Court found, "No agreement transmuting the property was ever prepared by Partridge or O'Connell and none was introduced in evidence, nor did any witness testify to the actual

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[2] Partridge and the decedent never discussed the transmutation of any property other than the Les Vogel Chevrolet Company. (R. 33, 138.)

existence of such an agreement, either oral or written." (R. 33.) The taxpayers take exception to the above-quoted portion of the findings (Br. 13) and refer to a portion of Partridge's testimony as supporting and establishing that such an agreement existed. The taxpayers do not take exception to the further finding that Partridge did not know in fact whether there ever was a transmutation. (R. 34.) Partridge admitted he had no knowledge of *any* agreement relative to the transmutation of community property to separate property. (R. 141.) Despite this admission by Partridge, the decedent's personal attorney for 15 years (R. 111-112), the taxpayers claim (Br. 13-14) that he testified to the "actual existence" of such an agreement and make reference to portions of his testimony (R. 138-139). Examination of the quoted portion discloses that Partridge himself assumed it had been done in the first place and consistently hedged throughout his testimony as to the actual existence of a transmutation agreement. Thus it becomes clear that the taxpayers' exception is without foundation.

Although the unexecuted second will referred to a written transmutation agreement, the existence of this writing was never established and the Tax Court properly inferred that if such an agreement was contemplated it had not reached accomplishment at the time of the decedent's death. Thus, the Tax Court properly concluded that the taxpayers failed to show that a transmutation took place. Since the taxpayers concede that all the property originally owned by the decedent and Elizabeth was community property, all

the assets standing in the name of the decedent or in the name of Elizabeth, including the Chevrolet property, must be regarded as community property.[3]

Among the additional facts supporting the Tax Court findings are those concerning the treatment by the decedent and Elizabeth of dividends and gains and losses upon the sale of securities. Historically, the dividends were divided between decedent and Elizabeth. Significantly, the treatment was the same whether the stock was registered in the decedent's name or in Elizabeth's name or in both names jointly. This was also true with respect to the capital gain or loss on the sale of such securities. The decedent and Elizabeth always equally divided the dividends from the Les Vogel Chevrolet Company. On the 1947 federal income tax returns the capital gains on the sale of securities were described as community. On the 1947 state returns the total income reported was characterized as community. Upon the advice of attorneys, the decedent's and Elizabeth's dividends were segregated for the first time on the 1950 state tax returns filed after the decedent's death. (R. 24-25, 31-32.)

Even assuming *arguendo* that there had been a transmutation of the Chevrolet Company, all other property, including that held in Elizabeth's name, might still have been acquired with community funds, thereby retaining their community character. *In re Jolly's Estate, supra.* In this connection, no conten-

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[3] The pleadings raised no issue as to jointly held property. (R. 12, 42.)

tion was ever made that the salary payments to the decedent were transformed into separate property. The decedent's salary was about $1,800 per month (R. 34) and with bonuses aggregated in excess of $30,000 per year (R. 101).

The decedent's salary checks were deposited in various bank accounts maintained by decedent and Elizabeth. A checking account was maintained in the name of Les or Elizabeth Vogel. Two savings accounts were maintained in the name of decedent and Elizabeth. One savings account was in the name of Elizabeth. (R. 23, 29.)

As previously mentioned, the separate drawing accounts of the partnership were combined into one account on the corporate books against which were charged various investments of the decedent. In October, 1947, one half of the remaining balance of the combined account was deposited in the savings account in the name of Les or Elizabeth Vogel, and subsequently withdrawn. The other half was deposited in the savings account in the name of Elizabeth. Some of decedent's salary checks were also deposited in the account in Elizabeth's name. The amounts were subsequently transferred to the checking account in the name of Les or Elizabeth Vogel. (R. 23, 29.)

The principal deposits to the other savings account in both names were the decedent's salary checks. Elizabeth made most of these deposits and as a practice retained $100 to $300 from the checks for household expenses. Transfers were made from this account to the checking account. (R. 24, 30.)

A number of salary checks were deposited directly into the checking account, held in the name of Les or Elizabeth Vogel. The decedent made payments out of this account for investments in Elizabeth's name as well as for his own individual expenditures and for joint living expenses. Payment for 467 shares of Bank of America stock standing in Elizabeth's name was also made from the checking account. Investments in a separate brokerage account maintained since 1948 in Elizabeth's name were paid for from the checking account. The decedent's separate brokerage account had been opened in 1946. The decedent's purchases during 1946 and 1947 were charged to his partnership drawing account prior to the dissolution and thereafter to his and Elizabeth's drawing account on the corporation's books. (R. 23, 24, 30.) It is apparent from the foregoing that unquestioned community property in the form of decedent's salary was, at best, so commingled with other funds, whatever their nature, that tracing is impossible. The whole, therefore, will be treated as community property and all property acquired therefrom should be deemed community. *Pedder* v. *Commissioner*, 60 F. 2d 866 (C. A. 9th); *Fountain* v. *Maxim*, 210 Cal. 48, 290 Pac. 576.

Finally, during a conversation with an internal revenue agent after decedent's death, Elizabeth referred to the Anzavista apartment property as decedent's. (R. 31, 198.) She further represented that whatever property she and decedent had belonged to both of them. (R. 31, 199, 209.) At the trial, Eliza-

beth stated that the Anzavista property "was the whole family's." (R. 31, 175.)

In brief, the record is devoid of any evidence supporting a transmutation from community property to separate property. Additionally the record completely supports the findings of the Tax Court and, in fact, compels no other conclusion than that all the property in question was community property.

II

The Taxpayers Have Failed To Demonstrate That An Amount In Excess of the $1,000 Per Month for 18 Months Was Reasonable and Proper In Ascertaining the Deduction for Family Allowance

The taxpayers complain of the Tax Court's conclusion that the family allowance should be limited to $1,000 per month for 18 months. Significantly, this contention is made with a complete failure of attack upon the Tax Court's reasoning. The taxpayers had claimed a deduction for $1,500 per month for 18 months, which amount had been allowed by the state probate court. After careful consideration of the matter, the Commissioner determined that the proper family allowance was $1,000 per month for 18 months and permitted deduction of one half of the total. (R. 15.) The Tax Court sustained the Commissioner.

Section 812(b)(5) of the Internal Revenue Code of 1939 (Appendix, *infra*), as effective for the period herein involved,[4] provides for a deduction from the

[4] This section was repealed by Section 502(c) of the Revenue Act of 1950 but the change was effective with respect

gross estate of the amounts actually expended and "reasonably required", during settlement of the estate, for the support of those dependent upon the decedent. *Estate of Jacobs* v. *Commissioner*, 8 T. C. 1015. In the determination of the proper amount deductible for this purpose the test is not what the state probate court may have allowed but rather what amounts are reasonably required within the meaning of the federal statute. *Buck* v. *Helvering*, 73 F. 2d 760 (C. A. 9th); *Estate of McIntosh* v. *Commissioner*, 25 T. C. 794, affirmed on other grounds, 248 F. 2d 181 (C. A. 2d) certiorari denied, 355 U. S. 923; *Estate of Hanch* v. *Commissioner*, 19 T. C. 65. In this regard, Section 81.40 of Treasury Regulations 105 (Appendix, *infra*) limits the deduction to an amount not in excess of what is reasonably required.

The Tax Court noted that the decedent spent most of his monthly salary of $1,800 in maintaining his home. (R. 43.) However, the Tax Court cautioned, decedent had been providing maintenance for himself, his wife, and two adult children [5] whereas the allowance during the settlement of the estate was for the support only of the widow. Accordingly, the Tax Court reasoned that if the family of four was adequately maintained during decedent's life on $1,800 per month it followed that the Commissioner's allow-

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to estates of decedents dying after September 23, 1950, the date of enactment of the Revenue Act of 1950. Decedent herein died on August 16, 1950.

[5] The family allowance is not available to adult children unless incompetent. (California Probate Code, Section 680.)

ance of $1,000 per month for the maintenance of the widow alone was adequate and reasonable for her support in the manner to which she had been accustomed. The taxpayers do not attack this reasoning of the Tax Court. In light of the fact that there was little evidence of the actual cost of maintaining the home either before or during the settlement of the estate (R. 44), this reasoning, we submit, is eminently correct.

The taxpayers' citation of two other Tax Court cases finding that under the particular facts of those cases certain amounts were reasonable does not avoid the finding by the Tax Court in this case that $1,000 per month was reasonable. This finding is wholly supported by the record, by the statute, by the regulation, and by the clear reasoning of the Tax Court. Not only is this finding of fact not clearly erroneous, but the taxpayers have failed to show that a greater amount was reasonable and proper.

III

The Deduction for Attorney Fees Was Not Properly Put in Issue, and Could Not Have Been Raised As A New Issue Under the Tax Court Rule 50 Computation

When the opportunity arose for objecting to the Commissioner's computation under Tax Court Rule 50 (Appendix, *infra*), the taxpayers claimed a deduction for attorney fees in the amount of $1,000. (R. 47.) It has been long established that the only issues that may be raised on a hearing under Rule 50 are those that are strictly confined to the correct

computation of the deficiency resulting from the decision, and that no new issue may be raised. Tax Court Rule 50(c); *Bankers Coal Co.* v. *Burnet*, 287 U. S. 308, 312-313; *Fifth Street Bldg.* v. *Commissioner*, 77 F. 2d 605, 608-609 (C. A. 9th); *Commissioner* v. *Superior Yarn Mills*, 228 F. 2d 736 (C. A. 4th); *Shanis* v. *Commissioner*, 213 F. 2d 151 (C. A. 3d); *Davison* v. *Commissioner*, 60 F. 2d 50 (C. A. 2d). In complete accord with these principles, the Tax Court did not permit a deduction of the attorney fees because these fees "were not made the subject of assignment of error." (R. 226.)

There is no question but that a deduction for attorney fees, paid by the estate in contesting a deficiency in tax, is allowable when proved to be reasonable and provided that it is claimed at the proper point in the proceeding. That in the instant case the attorney fees deduction was not timely claimed is apparent from Treasury Regulations 105, Section 81.34, which in pertinent part expressly provides that:

> A deduction for attorneys' fees incurred in contesting an asserted deficiency or prosecuting a claim for refund should be claimed at the time such deficiency is contested or such refund claim is prosecuted.

No deduction was claimed herein at the time the notice of deficiency was given nor at the time the petition for redetermination was filed. Yet, even accepting the liberal construction placed upon the Regulations by *Bohnen* v. *Harrison*, 232 F. 2d 406 (C. A. 7th), and applying such a liberal construction

to a deficiency case, it is clear that, at the latest, the deduction would have had to be claimed by the time of filing the petition. That was not done here. (R. 5-8.)

Neither *Estate of Tillotson* v. *Commissioner*, 44 B. T. A. 644, nor *Leewitz* v. *United States*, 75 F. Supp. 312 (C. Cls.), certiorari denied *sub nom.*, *Leeds* v. *United States*, 335 U. S. 820, support the taxpayers for in both cases no question was raised as to the timeliness since attorney fees had been claimed in the returns. At the trial the taxpayers were apprised by the Commissioner's counsel that no issue was raised in the pleadings with regard to attorney fees (R. 185) at a time when the situation could have been remedied by amending their petition under Tax Court Rule 17 (Appendix, *infra*). However, the taxpayers failed to do so and therefore are not entitled to the deduction asserted for attorneys fees.[6]

Additionally, whether the attorney fees paid were reasonable and were paid on behalf of the estate was not satisfactorily established by the bare testimony of the decedent's son, Les Vogel, Jr. (R. 186-188.) There would have been adequate opportunity to establish such facts if the amendment to the petition had been made. If the parties had then been unable to agree under Rule 50, Tax Court Rule 51 (Appendix, *infra*) would have permitted the taxpayers to reopen the case for further trial on that issue. For these various reasons, the Tax Court correctly

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[6] The claim for attorney fees in an additional amount (Br. 27) falls along with the claim for the $1,000.

held that the attorney fees "are not in the case". (R. 226.)

IV

The Taxpayers Untimely Raised An Issue, in the Course of the Tax Court Rule 50 Computation, Concerning the Deductibility of Funeral Expenses in Full When the Entire Estate Consists of Community Property, and Further, the Deduction Was Properly Limited to One-Half of the Amount of Funeral Expenses

During the course of the Rule 50 computation, the taxpayers also attempted to raise a new issue as to the amount of the deduction for funeral expenses. (R. 47.) Since the entire estate had been determined to be community property, the Commissioner had allowed only one-half of the funeral expenses as a deduction from the gross estate. (R. 13.) The Tax Court sustained this determination. (R. 226.) Even though admitting that the claim for the *full* amount of the funeral expenses as a deduction was not raised in the pleadings (Br. 28), the taxpayers maintain that they are entitled to relief on this untimely issue.[7] However, the various authorities cited in Point III, *supra*, apply with equal force here, compelling the conclusion that this issue is not in the case.

Even assuming, *arguendo*, that the issue of the deduction of funeral expenses in full had been timely

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[7] We assume that taxpayers' Point IV is directed solely to the fourth specification of error (Br. 5), and note, as a matter of clarification, that even as late as the Rule 50 computation the taxpayers made no objection whatsoever with regard to any item other than attorney fees and funeral expenses (R. 47).

raised, the taxpayers rely wholly upon *Estate of Lee* v. *Commissioner*, 11 T. C. 141, which is limited by its very terms to Idaho law. However, Section 202 of the Probate Code of California (Appendix, *infra*) expressly provides that "Community property passing from the control of the husband, either by reason of his death * * * is subject to his debts and to administration and disposal under the provisions of Division 3 of this Code; . . ." Accordingly, the costs of administration, the debts of the husband and the family allowance are chargeable against the entire community property. *In re Coffee's Estate*, 19 Cal. 2d 248, 120 P. 2d 661; *In re Hirsch's Estate*, 122 C. A. 2d 822. See *United States* v. *Merrill*, 211 F. 2d 297, 301 (C. A. 9th). It is clear that funeral expenses are encompassed within Probate Code Section 202 for the wife's share will not be charged for the payment of such debts if the husband provides otherwise by will. *In re Chanquet's Estate*, 184 Cal. 307, 193 Pac. 762; *In re Marinos' Estate*, 39 Cal. App. 2d 1, 7, 102 P. 2d 443, 446-447. In *United States* v. *Merrill*, *supra*, p. 301, this Court noted that in California, as in Washington, the entire community property is subject to the community debts and expenses of administration where, as here, the husband predeceased the wife. In the instant case, as in *Lang* v. *Commissioner*, 97 F. 2d 867 (C. A. 9th), a case arising in Washington, only one-half of the funeral expenses is deductible from the gross estate when the entire gross estate is community property.

CONCLUSION

It is submitted that the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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AUGUST, 1959

APPENDIX

California Civil Code:

Sec. 162. *Separate property; wife.*

SEPARATE PROPERTY OF THE WIFE. All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property. (Enacted 1872.)

Sec. 164. *Community property; presumptions as to property acquired by wife; limitation of actions.*

All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the

presumption is that such property is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.

California Probate Code:

SEC. 202. *Death of husband, property subject to debts and administration, disposal; death of wife, husband's powers and duties relating to property*

Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division 3 of this code; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect. (Stats. 1931, c. 281, p. 596, Sec. 202.)

Internal Revenue Code of 1939:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or

personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * *

(26 U.S.C. 1052 ed., Sec. 811.)

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * *

(b) *Expenses, Losses, Indebtedness, and Taxes.*—Such amounts—

(1) for funeral expenses,
(2) for administration expenses,

* * * *

(5) reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent,

as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, * * *.

* * * *

(e) [As added by Sec. 361(a) of the Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of marital deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

* * * *

(H) *Limitation On Aggregate Of Deductions.*—The aggregate amount of the deductions allowed under this paragraph (computed with regard to this subparagraph) shall not exceed 50 per centum of the value of the adjusted gross estate, as defined in paragraph (2).

(2) *Computation of adjusted gross estate.*—

(A) *General Rule.*—Except as provided in subparagraph (b) of this paragraph the adjusted gross estate shall, for the purposes of paragraph (1) (H), be computed by subtracting from the entire value of the gross estate the aggregate amount of the deductions allowed by subsection (b) of this section.

(B) *Special Rule In Cases Involving Community Property.*—If the decedent and his surviving spouse at any time held property as community property under the law of any State, Territory, or possession of the United States, or

of any foreign country, then the adjusted gross estate shall, for the purposes of paragraph (1) (H), be determined by subtracting from the entire value of the gross estate the sum of:

(i) the value of property which is at the time of the death of the decedent held as such community property; and

(ii) the value of property transferred by the decedent during his life, if at the time of such transfer the property was held as such community property; and

(iii) the amount receivable as insurance under policies upon the life of the decedent to the extent purchased with premiums or other consideration paid out of property held as such community property; and

(iv) an amount which bears the same ratio to the aggregate of the deductions allowed under subsection (b) of this section which the value of the property included in the gross estate, diminished by the amount subtracted under clauses (i), (ii), and (iii) of this subparagraph, bears to the entire value of the gross estate.

For the purposes of clauses (i), (ii), and (iii) community property (except property which is considered as community property solely by reason of the

provisions of subparagraph (C) of this paragraph) shall be considered as not "held as such community property" as of any moment of time, if, in case of the death of the decedent at such moment, such property (and not merely one-half thereof) would be or would have been includible in determining the value of his gross estate without regard to the provisions of section 811 (e) (2). The amount to be subtracted under clause (i), (ii), or (iii) shall not exceed the value of the interest in the property described therein which is included in determining the value of the gross estate.

(C) *Same—Conversion Into Separate Property—*

(i) If during the calendar year 1942 or after the date of the enactment of the Revenue Act of 1948, property held as such community property (unless considered by reason of subparagraph (B) of this paragraph as not so held) was by the decedent and the surviving spouse converted, by one transaction or a series of transactions, into separate property of the decedent and his spouse (including any form of co-ownership by them), the separate property so acquired by the decedent and any property acquired at any time by the decedent in exchange therefor (by one exchange or a series of exchanges) shall, for the purposes of clauses (i), (ii),

and (iii) of subparagraph (B), be considered as "held as such community property".

(ii) Where the value (at the time of such conversion) of the separate property so acquired by the decedent exceeded the value (at such time) of the separate property so acquired by the decedent's spouse, the rule in clause (i) shall be applied only with respect to the same portion of such separate property of the decedent as the portion which the value (as of such time) of such separate property so acquired by the decedent's spouse is of the value (as of such time) of the separate property so acquired by the decedent.

* * * *

(26 U.S.C. 1952 ed., Sec. 812.)

Treasury Regulations 105; promulgated under the Internal Revenue Code of 1939:

SEC. 81.34 [As amended by T. D. 5596, 1948-1 Cum. Bull. 127] *Attorney's fees.*—The executor or administrator, in filing the return, may deduct such an amount of attorney's fees as has actually been paid, or in an amount which at the time of such filing it is reasonably expected will be paid. If on the final audit of a return the fees claimed have not been awarded by the proper court and paid, the deduction will, nevertheless, be allowed, provided the Commissioner is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reason-

able remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. If the deduction is disallowed in whole or in part on final audit, the disallowance will be subject to modification as the facts may later require.

A deduction for attorneys' fees incurred in contesting an asserted deficiency or in prosecuting a claim for refund should be claimed at the time such deficiency is contested or such refund claim is prosecuted. A deduction for such fees shall not be denied, and the sufficiency of a claim for refund shall not be questioned, solely by reason of the fact that the amount of the fees to be paid was not established at the time that the right to the deduction was claimed.

Attorney's fees incurred by beneficiaries incident to litigation as to their respective interests do not constitute a proper deduction, inasmuch as expenses of this character are properly charged against the beneficiaries personally and are not administration expenses.

SEC. 81.40 *Support of dependents.*—The support of dependents of the decedent during the settlement of the estate is deductible pursuant to the following rules:

(a) In order to be deductible, the allowance must be authorized by the laws of the jurisdiction in which the estate is being administered, and not in excess of what is reasonably required.

(b) The allowance for which deduction may be made is limited to support during the settlement of the estate. Any allowance for a more extended period is not deductible.

(c) There must be an actual disbursement from the estate to the dependents, but after pay-

ment has been made the right of deduction is not affected by the fact that the dependents do not expend the entire amount for their support during the settlement of the estate.

Rules of Practice of the Tax Court of the United States (Rev. 1958):

RULE 17. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) *General.*—A motion for leave to amend a pleading shall state reasons for granting it and shall be accompanied by the proposed amendment.

(b) *Petition.*—

(1) *Before answer.*—The petitioner may amend his petition at any time before answer is filed.

(2) *After answer.*—A petition may be amended, after answer is filed and up to the commencement of the trial, only with the consent of the Commissioner or by leave of the Court.

(c) *Amendment ordered.*—

(1) *Occasion for.*—The Court upon its own motion, or upon motion of either party showing good cause filed prior to the setting of the case for trial, may order a party to file a further and better statement of the nature of his claim, of his defense, or of any matter stated in any pleading. Such a motion filed by a party shall point out the defects complained of and the details desired.

(2) *Consideration of such motion.*—The Court, in its discretion, may set such a motion for hearing (see Rule 27 (a) or may act upon it *ex parte.*

(3) *Penalty for failure to amend.*—The Court may strike the pleadings to which the motion was directed or make such other order as it deems just, if an order of the Court to file amended pleadings hereunder is not obeyed within 15 days of the date of the service of said order or within such other time as the Court may fix.

(d) *To conform pleadings to proof.*—The Court may at any time during the course of the trial grant a motion of either party to amend its pleadings to conform to the proof in particulars stated at the time by the moving party. The amendment or amended pleadings thus permitted, shall be filed with the Court at the trial or shall be filed in the office of the Clerk of the Court in Washington, D. C., within such time as the Court may fix. (See Rules 4, 5, and 19.)

* * * *

RULE 50. COMPUTATIONS BY PARTIES FOR ENTRY OF DECISION

(a) *Agreed computations.*—Where the Court has filed its opinion determining the issues in a case, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Court's determination of the issues, showing the correct amount of the deficiency or overpayment to be entered as the decision. If the parties are in agreement as to the amount of the deficiency or overpayment to be entered as the decision pursuant to

the report of the Court, they or either of them shall file promptly with the Court an original and 2 copies of a computation showing the amount of the deficiency or overpayment and that there is no disagreement that the figures shown are in accordance with the report of the Court. The Court will then enter its decision.

(b) *Procedure in absence of agreement.*—If, however, the parties are not in agreement as to the amount of the deficiency or overpayment to be entered as the decision, in accordance with the report of the Court, either of them may file with the Court a computation of the deficiency or overpayment believed by him to be in accordance with the report of the Court. The Clerk will serve a copy thereof upon the opposite party, will place the matter upon a motion calendar for argument in due course, and will serve notice of the argument upon both parties. If the opposite party fails to file objection, accompanied by an alternative computation, at least 5 days prior to the date of such argument, or any continuance thereof, the Court may enter decision in accordance with the computation already submitted. If in accordance with this Rule computations are submitted by the parties which differ as to the amount to be entered as the decision of the Court, the parties will be afforded an opportunity to be heard in argument thereon on the date fixed, and the Court will determine the correct deficiency or overpayment and enter its decision.

Rule 51. Estate Tax Deduction Developing After Trial

If the parties in an estate tax case are unable to agree under Rule 50, or under a remand, upon

a deduction involving expenses incurred at or after the trial, the petitioner may move to reopen the case for further trial on that issue provided it is raised in the petition or by amendment thereto.

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